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A Chance to Be Heard: Thoughts about Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund

Stephan Landsman

A CHANCE TO BE HEARD: THOUGHTS ABOUT SCHEDULES, CAPS, AND COLLATERAL SOURCE DEDUCTIONS IN THE SEPTEMBER 11TH VICTIM COMPENSATION FUND

*Stephan Landsman**

INTRODUCTION

I was standing in the locker room of the YMCA in Evanston, Illinois, when I first saw the pictures of the World Trade Center. The television images of a smoldering building with a gash in its side seemed like a bizarre clip from a Bruce Willis movie. As events unfolded, unreality was transformed into shock and horror. My thoughts turned to New York friends, the Sears Tower (in Chicago), and a hundred other nightmares. Over the next forty-eight hours, I renewed long-neglected connections to reassure and be reassured. Something enormous and frightening had occurred. It touched my life and the lives of those around me with an unparalleled immediacy. The disaster was both real and *personal.* This was not about a grainy set of photographs from a far off Dallas street, but about the skyscraper three blocks from my office. It was not about a national day of mourning for a fallen leader, but about whether I could ever again get on an airplane. There was a crisis and it was a crisis in my life.

One of the swiftest and most remarkable reactions among Americans to the September 11th attack was a desire to help the victims in some tangible way. This led to the donation of countless pints of blood and more than one billion dollars in charitable contributions. We all wanted to be doing or sending something. It was into this maelstrom of strong emotions and desires that our political leaders stepped in the aftermath of calamity. To our wish to help, they added the rhetoric of war and heroism. The President and his advisors declared a war on terrorism. This was to be real war with combat, casualties, security restrictions, and sacrifice. It was also a time to honor heroes. The brave New York policemen, firemen, and EMS workers who charged into the burning towers were on all of our minds. Their courage and sacrifice inspired us all. Their deeds, it soon emerged,

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had been matched by those of the passengers and crew on one of the flights who had fought back against their hijackers and salvaged something of a victory for all of us by thwarting the terrorists' apparent plan to crash their plane into some Washington, D.C. target.

Into this highly charged environment stepped the well-organized lobbyists of the American airline industry seeking assistance for their badly battered clients. Their objective was to secure a bailout for the industry. According to the *New York Times*,[1] by Thursday, September 20, 2001, the basic structure of rescue legislation had been hammered out. There remained, however, one key sticking point. Democratic legislators insisted "that there would be no deal . . . without compensation for [the] victims."[2] Representatives of President George W. Bush proposed a single consolidated lawsuit in Manhattan with government payment to be made only if the claimants were able to prove liability and after the exhaustion of airline insurance coverage. The Democrats rejected this proposal and insisted on the creation of a government fund. The details of such a fund were negotiated over the next twenty-four hours (ending at 4:00 a.m. on Friday, September 21).

According to the *New York Times*, the fund concept was attacked by Republican lawmakers as a potentially huge expenditure that was inequitable to victims of prior terrorist acts like the Oklahoma City bombing.[3] Despite these complaints, the Democrats held firm. In deference to Republican budgetary concerns, however, a provision was inserted in the legislation requiring that the compensation to be paid to victims by the fund would be reduced on a dollar-for-dollar basis to reflect any "collateral source" payments (like life insurance benefits or pension plan payouts) that victims might receive. Furthermore, Republicans insisted that the administrator of the fund, the so-called Special Master to be appointed by the Attorney General, be given broad managerial and adjudicative powers so he might protect the government fisc insofar as possible given the objectives of the fund. With this balancing of the conflicting desires to care for the victims and control government expenditures, fund legislation was drafted and inserted into the Air Transportation Safety and System Stabilization Act.[4] The Act was signed into law by the President on September 22, 2001.

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1. Diana B. Henriques & David Barstow, *Fund for Victim's Families Already Proves Sore Point*, N.Y. TIMES, Oct. 1, 2001, at A1.

2. *Id.*

3. *Id.*

4. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(b)(1)(B)(ii), 115 Stat. 230, 238 (2001).

This victim compensation program is unprecedented. No such fund was established for victims of prior terrorist activities, including the 1988 destruction of Pan Am Flight 103 over Lockerbie, Scotland, the 1995 bombing of the Federal Building in Oklahoma City, or the attacks in 1998 on two American embassies in East Africa. In fact, a blank check for government compensation to those injured by what might be described as tortious or criminal third party conduct is unique in American legal experience. The only thing that can explain such an outcome is the singular alignment of a variety of forces all pulling in the same direction at once, a syzygy of political and social planets lined up at a unique moment in time. Here, those forces included the bailout of the airlines, the rhetoric of heroism that clothed a significant number of the victims, and the widespread desire among Americans to contribute something to help ameliorate the suffering of the victims of the attacks.

II. CONGRESSIONAL LEGISLATION

The September 11th Victim Compensation Fund of 2001 was attached to legislation intended to assist the American airline industry in recovering from the effects of the terrorist acts that destroyed four aircraft as well as the World Trade Center and severely damaged a wing of the Pentagon. The airline industry received a range of benefits from the legislation. These included federal loan guarantees of up to $10 billion,[5] compensation of up to $5 billion for "direct losses incurred beginning on September 11, 2001, by air carriers as a result of any Federal ground stop order,"[6] and compensation for "incremental losses" from September 11 to December 31, 2001.[7] The Act also provided the airlines with reimbursement for any increase in the cost of insurance through October 1, 2002,[8] as well as a cash flow benefit from the deferral of the deposit of excise taxes.[9]

The *airlines'* benefit package was rounded out by the creation of the September 11th Fund itself. The Fund was not simply a promise to help victims or recompense heroes, but a part of the bailout of the aviation industry. Anyone who elected compensation under the provisions of the Fund was foreclosed from filing suit to recover "damages sustained as a result of the terrorist-related aircraft crashes."[10]

5. *Id.* § 101(a)(1).
6. *Id.* § 101(a)(2)(A).
7. *Id.* § 101(a)(2)(B).
8. *Id.* § 201(b).
9. *Id.* § 301(a)(1).
10. Air Transportation Safety and System Stabilization Act § 405(c)(3)(B)(i).

Moreover, even if an injured individual sought to proceed in court (foregoing any claim under the provisions of the Fund), his or her prospects were drastically curtailed by section 408 of the Act, which created a single exclusive cause of action and imposed a strict "limitation on air carrier liability."[11] The total "liability for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier should not be in an amount greater than the limits of the liability coverage maintained by the air carrier."[12] In other words, apart from the Fund, payments to all claimants including the owners of damaged or destroyed property, businesses suffering disruptions, and individuals experiencing personal injuries were capped at a level dictated by the airlines' insurance coverage (a sum far smaller than all the losses suffered). Moreover, section 408 created one exclusive venue for all claims arising out of the hijackings by requiring that all such cases be heard in the United States District Court for the Southern District of New York. In essence, this section of the Act reduced the number of non-Fund remedies to one, required that all claimants be placed in a single pool of such enormous dimensions that none of the claimants would be likely to recover anything close to full compensation, and virtually guaranteed protracted litigation of great complexity.

A key question about this legislation is whether it works a de facto cancellation of the right to proceed in court (rather than providing a choice of remedies as it claims) and, if so, whether it is lawful to deny injured individuals access to remedies that existed when they were hurt and require them to rely on a fund for compensation instead. As to the first question, while it is clear that the legislation does not bar litigation by injured individuals, it does narrow their choices so severely (cutting off all state court proceedings, establishing a single federal cause of action that must be tried in the Southern District of New York, and capping compensation to all business and individual claimants) that a balanced assessment might conclude that only the shell of a court-based litigation option remains for injured individuals. If it is assumed that the September 11th victims have been stripped of their right to proceed in court, then the question arises as to the lawfulness of such a step.

The legal legitimacy of such legislative action is not entirely clear. There are, however, several United States Supreme Court decisions

11. *Id.* § 408.
12. *Id.* § 408(a).

suggesting that such a result is not unlawful so long as affected litigants are provided "a fair and reasonable substitute for the uncertain recovery of damages."[13] One of these cases, *Duke Power Co. v. Carolina Environmental Study Group*,[14] involved the passage of the Price-Anderson Act,[15] which imposed a $560 million cap on liability for nuclear accidents arising out of the operation of private federally-licensed nuclear power plants. The same legislation created a $560 million fund for indemnification purposes and required injured parties to waive all other claims in order to participate in the fund. The Price-Anderson Act did leave open the possibility that Congress might supplement the fund in case of a disaster, but made no promise to that effect. The Supreme Court upheld the legislation against a variety of due process and other constitutional challenges, stressing its provision of a speedy and reasonably well-funded alternative to litigation. The Court cited with approval its earlier decision upholding the New York Workmen's Compensation Act in which it declared that the Due Process Clause of the Fourteenth Amendment is satisfied if workers who have lost the right to sue are provided "moderate compensation in all cases of injury, and [have] a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages."[16] According to the Court, such programs are defensible so long as they guarantee "a reasonably just substitute for the common-law rights replaced."[17]

A second case to uphold a substitution of remedies, although in a significantly different context, was *Dames & Moore v. Regan*.[18] There, the Supreme Court recognized the President's power to suspend private legal claims against Iran in the wake of the hostage crisis and substitute in their place a Claims Tribunal. The Court's decision was based largely on the President's great latitude to conduct the foreign affairs of the United States. The Court, however, accepted the suspension of litigation for the additional reason that the administration "provided an alternative forum, the Claims Tribunal, which is capable of providing meaningful relief."[19]

Duke Power, *Dames & More*, and *New York Central Railway Company* strongly suggest that the right to sue may be taken but that there is a clear expectation that a reasonable substitute will be provided.

13. Duke Power Co. v. Carolina Envtl. Study Group, Inc. 438 U.S. 59, 91 (1978).
14. *Id.*
15. 42 U.S.C. § 2210 (2000).
16. N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 201 (1917).
17. *Duke Power Co.* , 438 U.S. at 92.
18. 453 U.S. 654 (1981).
19. *Id.* at 687.

Whatever Congress had in mind when it created the September 11th Victim Compensation Fund, these opinions impose some constraints on what can be done with respect to victims' claims. Congress was under a legal obligation to provide something approximating "a fair and reasonable substitute."[20]

What Congress mandated for victims was a program it said was intended to "provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed."[21] The compensation to be provided was spelled out in the Act and included both "economic loss," which was defined as:

> [A]ny pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law[22]

and "noneconomic losses," which were defined as: "[L]osses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature."[23]

These definitions are extremely expansive and recognize a broader range of compensable losses than those recognized in virtually any state, most particularly with respect to "hedonic damages."[24] The Special Master was charged by the legislation to review each victim's claim and, with respect to eligible individuals, determine: "(i) the extent of the harm to the claimant, including any economic and noneconomic losses; and (ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant."[25]

The legislation did not make any provision for the capping of awards or for reductions to reflect the reduced "need" of the well-to-do. It did, however, specify that awards were to be reduced by collateral source payments received by victims. These were defined as: "[A]ll collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local govern-

20. *Duke Power Co.*, 438 U.S. at 91.

21. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 403, 115 Stat. 230, 237 (2001).

22. *Id.* § 402(5).

23. *Id.* § 402(7).

24. *Id.*

25. *Id.* § 405(b)(1)(B).

ments related to the terrorist-related aircraft crashes of September 11, 2001."[26] Claimants were entitled to hearings at which they might be represented by counsel and at which witnesses and documents could be presented.[27] The award determination of the Special Master was to be final and unappealable.[28] Submission of a claim to the Special Master cut off the right to file a civil action.[29]

With respect to the victims, this program did not, on its face, seem to be crafted as a charitable endeavor to help the needy. Rather, it seemed designed to provide a remedy similar to that available in a tort proceeding, minus collateral source payments. The legislation appeared to share the widespread public desire to do something tangible and generous for victims and provide a significant gesture to the heroic uniformed victims, all of whom were covered by the terms of the Fund. Fiscal concerns were addressed by use of the collateral source mechanism. The legislation seemed to contemplate real hearings at which documentary proof and testimony could be presented. (This suggestion must be tempered by recognition of the short processing periods specified in the legislation and its emphasis on claim forms.)

III. THE SPECIAL MASTER COMES ON THE SCENE—PROMULGATION OF THE INTERIM FINAL RULE

Kenneth Feinberg was designated Special Master on November 26, 2001 and, as required by the statute, issued regulations, entitled the "Interim Final Rule," on December 21 of the same year.[30] (Section 407 of the Act required promulgation of regulations no later than ninety days after the signing of the legislation.) The regulations were preceded by a "Statement" in which the Special Master endeavored to explain his approach to the Fund program and his rationale for the regulations he was putting in place. His opening paragraph set out his view of the nature of the Fund. He described it as "an unprecedented expression of compassion" that was "designed to bring *some measure* of financial relief . . . to those most in need."[31] This formulation was strikingly different from the "compensation" language used in the Act itself. By such verbiage, the Special Master transformed the Fund into a vehicle for charity. Benefits were no longer conceptualized in terms

26. *Id.* § 402(4).

27. Air Transportation Safety and System Stabilization Act § 405(b)(4).

28. *Id.* § 405(b)(3).

29. *Id.* § 405(c)(3)(B).

30. September 11th Victim Compensation Fund of 2001, Interim Final Rule, 66 Fed. Reg. 66,274 (Dec. 21, 2001).

31. 66 Fed. Reg. at 66,274 (emphasis added).

of the payment of proven economic and noneconomic losses, but rather, as the Special Master's assessment of needed relief. The revocation of the right to sue and the operation of the fund as a substitute for that right had been replaced by notions of charitable generosity controlled by a nearly all-powerful bureaucrat.

The Special Master stated that the regulations he drafted had two objectives: "[t]o provide fair, predictable and consistent compensation" and "to do so in an expedited, efficient manner without unnecessary bureaucracy and needless demands on the victims."[32] The Master contrasted his approach with that of the courts which he said were inefficient, uncertain, and costly. He defended his approach to the structuring of the Fund's operations by arguing that it would provide "speedy and efficient compensation, which will help bring some closure to the events of September 11."[33] The emphasis was now on need, predictability, and a horizontal equity that, as far as possible, would treat all claimants equally. The Master's vision was of a process without any significant number of formal hearings that would dole out needed dollar awards without requiring victims to "revisit the tragic events of September 11 over and over again."[34] A chance to voice one's feelings, speak about one's loss, or otherwise individualize the process was not seen as essential.

In line with the Special Master's ideas about charitable relief for the needy, efficiency of assessment, and horizontal equity, the regulations established a methodology for calculating awards that seems a radical departure from what Congress had originally envisioned. The Master proposed a cabining of awards within predetermined limits—highs and lows were to be excised. Feinberg's rationale for what was, in essence, a system with a presumptive cap and floor was as follows:

> We have concluded that any methodology that does nothing more than attempt to replicate a theoretically possible future income stream would lead to awards that would be insufficient relative to the needs of some victims' families, and excessive relative to the needs of others. The statute specifies that individual circumstances beyond economic and noneconomic harm should be taken into account. It is our view that, absent extraordinary circumstances, awards in excess of $3 million, tax-free, will rarely be appropriate in light of individual needs and resources. At the same time, we want to ensure that victims' families are receiving at least a minimum level of resources to help meet their needs and rebuild their lives. Thus, we have concluded that families of deceased victims should

32. *Id.*
33. *Id.*
34. *Id.*

> receive a combined total of at least $500,000 from this program, other state and Federal programs, life insurance policies and other sources of compensation. Similarly, the baseline for single decedents should be $300,000. This ensures that every needy claimant's total compensation from this program and other sources will be at least equal to these threshold amounts.[35]

A close examination of the legislation does not seem to support the Special Master's assertions about need-based *reductions* of awards. By something like fiat, the Special Master had changed the character of the program.

The Special Master had to overcome a number of obstacles to accomplish this award-limiting goal. Perhaps the most formidable was Congress's exceedingly expansive definitions of economic and noneconomic losses. He therefore discussed the measurement of damages at some length in his Statement. Again, he began by stating two objectives, not surprisingly, similar to those he had previously set out regarding his overall administration of the Fund. His first objective with respect to the assessment of loss was "that the process should be efficient, straightforward, and understandable to the claimants."[36] The second was "that each claimant should, to the greatest extent possible, be treated fairly based on the claimant's own individual circumstances and relative to other claimants."[37] It is interesting to compare these objectives with those of the legislation. Full compensation has been downplayed and horizontal equity highlighted, hence redefining the notion of fairness. This is a logical shift in light of the Master's desire to justify an economic loss calculation methodology that proposes a cap (albeit one described as "presumptive") and is premised on a pre-established schedule.

In the name of an allegedly efficient, user friendly, and equitable approach, virtually all grounds for proof, contest, and argument were read out of the Fund process. In their place, the Master substituted charts and schedules that specified *to the dollar* how much individuals of a specified age, with a specified income, and a specified number of dependents could expect to receive. Gone was any need for a claimant to say anything at a hearing—a few simple facts jotted on a form would yield a precise and unvarying award. The Special Master warned that claimants should not expect variations from his schedule of economic loss and, more particularly, no awards in excess of the top schedule figures. In making the latter point, he said there were not

35. *Id.* at 66,274-75.

36. *Id.* at 66,278.

37. 66 Fed. Reg. at 66,278.

likely to be "awards grossly in excess of the highest awards listed in the Special Master's presumed award chart."[38] That chart calculated awards for incomes up to the ninety-eighth percentile of individual incomes in the United States. The Special Master stated that victims with incomes above the ninety-eighth percentile level should not expect full compensation. The Master left some room for the presentation of "extraordinary circumstances" at a hearing but provided virtually no guidance about what such circumstances might be and how they might be established. What rings in the ear is the Master's insistence on caps and his schedule methodology. He said of the wealthiest potential claimants: "[M]ulti-million dollar awards out of the public coffers are not necessary to provide them with a strong economic foundation from which to rebuild their lives."[39] The focus had shifted from loss to need. This was a remodeling of the Fund to suit objectives like charity, fiscal restraint, horizontal equity, and efficiency, rather than the statutory objectives that appeared to mirror those of tort law.

The effort to contain awards and impose horizontal equity was carried even further with respect to noneconomic losses. Despite a strikingly liberal standard for the calculation of noneconomic losses, the Special Master decreed a *flat and fixed presumed award* for all those who died: "The presumed noneconomic losses for decedents shall be $250,000 plus an additional $50,000 for the spouse and each dependent of the deceased victim. Such presumed losses include a noneconomic component of replacement services loss."[40] Claimants could seek to prove "extraordinary circumstances" that might justify departure from this fixed sum, but they were given no guidance or encouragement.

The next matter addressed by the Special Master was the nature of the hearings to be made available to claimants. The regulations proposed two alternatives: Track A and Track B. The first track involved the submission of a set of forms and the Master's calculation of a presumed award. The claimant might then accept the award or seek a hearing at which he or she would be permitted to show "extraordinary circumstances indicating that the presumed award does not adequately address the claimant's injury."[41] The focus of the whole process was the monetary award, pure and simple. If the claimant opted

38. *Id.*

39. *Id.*

40. September 11th Victim Compensation Fund of 2001, Final Rule, 67 Fed. Reg. 11,233, 11,246 (Mar. 13, 2002).

41. 66 Fed. Reg. at 66,279.

for Track B, there was no presumed award, but rather an immediate hearing at which "the Special Master or his designee will utilize the presumed award methodology, but may modify or vary the award if the claimant presents extraordinary circumstances."[42] Although the sequencing was varied, there did not seem to be much substantive difference between the two approaches. Both led back to the Special Master's schedules and methodology. The likelihood of a robust hearing was virtually nonexistent, as the Special Master seemed to suggest when he said that hearings on both tracks were "generally not to exceed two hours."[43]

Although the Special Master insisted that hearings were to be "nonadversarial," the Master or his designee was authorized "to question witnesses and examine the credentials of experts."[44] Moreover, the Special Master recognized in section 104.71 of the regulations that it was the function of his staff (including, apparently, hearing officers) to "prevent and detect fraud."[45] Taken together, these regulations indicate that, on a significant number of occasions, victims and decisionmakers will be in an adversarial posture. This arrangement raises the specter of clashes between adjudicator and claimant (or claimant's counsel) that may make the process appear one-sided and unfair. Such clashes may also compound the claimant's injury with the insult of an inquisitorial examination. Moreover, because the decisionmaker is not obligated under the regulations to "create or provide any written record of deliberations"[46] and all decisions by the Special Master are final, there is potential for the process to appear arbitrary and hostile to victims and their families.

The reaction to the Special Master's regulations was not entirely favorable. Both claimants and their support groups were sharply critical of the presumptive caps on economic and noneconomic losses as well as the presumptive awards methodology itself. Many were also concerned about the collateral source rule, which had the apparent effect of reducing a significant number of awards, especially those of uniformed victims, to very low levels (because of the generous benefits provided under other programs to individuals killed in the line of duty). There was a great deal of criticism of the Special Master's failure to include "domestic partners" (unmarried or of the same sex) to the list of those eligible for benefits. Amnesty International called for

42. *Id.*
43. *Id.* at 66,280.
44. *Id.* at 66,285.
45. *Id.* at 66,287.
46. 67 Fed. Reg. at 11,246.

"equal access to benefits under the Fund for all victims, regardless of sexual orientation or marital status."[47] Separate from concern about the number of dollars to be awarded, a great deal of anger, frustration, and distrust was voiced about the structure of the process proposed by the Special Master. A number of concerned parties felt that the process prevented claimants from having a say about their loss. Some critics focused particular attention on the two-hour limitation on hearings. The Fund seemed to be working to reduce valued lives to a cut-and-dried formula. Moreover, the Special Master was asking victims to place all their trust in him without any precedent by which to judge his conduct and no possibility of appellate review of his decisions. Victims were given no clear reason to trust the Master and no procedural protections from his arbitrary exercise of discretion.

IV. THE SPECIAL MASTER REFINES HIS REGULATIONS

On March 7, 2002, Kenneth Feinberg responded to the criticisms of the Interim Final Rule by announcing the promulgation of the "Final Rule" for the September 11th Victim Compensation Fund. His response to earlier criticism is revealing. As with the Interim Final Rule, the revised regulations are introduced by a Statement from the Special Master. This Statement begins by declaring:

> Since December 21, 2001, the date of the promulgation of the interim final rule, I have been engaged in meetings and conversations with September 11 victims, their families, public officials, representatives of private charities and interested concerned citizens of our nation and foreign nations as well. I have listened carefully to both supporters and critics of the interim final rule. I have benefited tremendously from their input. I believe that, as a direct result of that varying input, this final rule constitutes a product worthy of support by all those interested in a just, fair and efficient compensation program.[48]

The impression one gets from this declaration is that Feinberg is a man who is personally committed to the success of the Fund effort, but is decidedly sensitive about reactions to his initial work. In defense of his original proposals, he almost immediately cites laudatory remarks from *Newsweek*, the *New York Times*, the *New York Daily News*, and the *Washington Post*. While these media remarks offer some solace, there are no encomiums from victims or political figures. It may not be unfounded speculation to suggest that the Master felt himself under significant and critical scrutiny.

47. *Id.* at 11,242.
48. *Id.* at 11,233.

The Master's response to his critics lists nine bullet points. The first eight of these are all focused on increasing the size of the payouts to be provided by the Fund. It almost seems as if the Special Master decided to sweeten the Fund "pot" in order to deflect criticism or reacted to criticism by assuming that all objections are ultimately about economics. How does he do it? First, by defining collateral source payments narrowly, thereby leaving more dollars in claimants' awards. Second, by promising to exercise his "discretion" to adjust collateral source offsets in a downward direction whenever possible. Third, by *doubling* awards to the spouses and children of deceased victims from $50,000 to $100,000 each for noneconomic losses. He makes this change despite a curious insistence that his prior (smaller), presumptively binding noneconomic losses assessment was correct.[49] One is left to wonder why a doubling was warranted if the prior evaluation was proper and whether the numbers in both cases are anything other than arbitrary. Fourth, adjustments are made to the economic loss calculation methodology that are likely to increase awards. Fifth, the Master announced a "Policy Toward Final Awards" that amounts to a virtual promise that almost no claimant will get less than $250,000 in cash from the Fund. As Mr. Feinberg puts it:

> Having personally met with thousands of individual family members, discussing with them their various needs, I anticipate that, when the total needs of deceased victims' families are considered, it will be very rare that a claimant will receive less than $250,000, except in unusual situations where a claimant has already received very substantial compensation from collateral sources.[50]

All of this, especially the emphasis on discretion and the virtual promises, appear to amount to a plea by the Special Master that claimants should "trust him." If they do so, he seems to be assuring them, they will be rewarded handsomely. The problem with such an arrangement is that it locates virtually all power and "say" in the Special Master. Benevolence replaces process.

It is not until the ninth, and last, bullet point that a process-related issue is addressed. The Master rescinds his "suggested two-hour hearing limitation"[51] and recognizes the possibility that some hearings may be longer. It is only in this step that there is even an inkling that allowing people time to be heard has value, that hearings with real

49. "While the Department and the Special Master believe that the original presumed award charts are entirely sound and are based upon neutral, current data and generally accepted methodologies, the public comments did suggest certain adjustments that we determined were appropriate to implement." *Id.* at 11,237.

50. *Id.* at 11,234.

51. *Id.*

evidence might have some part to play in the Fund process, and that the Master's initial efforts in this regard may not have been wholly adequate. In defending his time limit change, Mr. Feinberg inadvertently reveals that his original approach may have been infected by one-size-fits-all thinking:

> Congress offered little guidance regarding the procedural framework for resolving claims. Nevertheless, we have provided varied procedural options for applicants because we know that one size and one system will not fit all. Victims who so choose may take a simple and direct route filing forms and accepting payment within a matter of weeks. Other victims may opt for a more detailed and lengthy process, electing for a hearing and exercising their opportunity to present their cases personally in greater detail.[52]

Circumstances were exactly the same when the December Interim Final Rule fixing the original two-hour limit was adopted. The only change since that time seems to have been criticism of the Special Master's resistance to extended substantive hearings. Although one still has ample grounds to doubt any change of heart by the Special Master, the abandoning of the two-hour limit at least indicates that criticisms about truncated process have been heard.

At the end of his Statement, the Special Master defends his program against the charge that it imposes a cap on recovery. Although he denies that there is any ceiling on awards, he "still anticipate[s] that awards in excess of $3 or $4 million will be rare."[53] One is left to ponder the words and form of expression chosen. There is no cap, but results seem locked in. The cavalier use of "$3 or $4 million" suggests a looseness with figures that is belied by the Fund's charts, schedules, and presumptive awards. One senses a benevolent but inflexible Master speaking—he seems to be saying "I will listen, but my mind is made up."

As things stand, there is a great deal to praise and to criticize in the September 11th Victim Compensation Fund of 2001. It provides a critical component in the package needed to bail out a truly endangered airline industry. It also represents a unique governmental effort to reach out to individuals hurt in a man-made disaster and compensate them for their losses. The amounts of compensation it proposes are far more generous than awards made in any past program. These are remarkable achievements and suggest the possibility of a whole new way of approaching otherwise intractable problems caused by human misconduct or miscalculation. What is missing is sensitivity to

52. 67 Fed. Reg. at 11,234.
53. *Id.*

the need of claimants for a process that helps them come to emotional and psychological terms with their loss, or persuades onlookers of its integrity and legitimacy, by providing transparent and participatory proceedings. These problems begin with Congress's legislation, which cuts off any real opportunity for a day in court and substitutes an ill-defined claims process. As the manager of the claims mechanism, Congress installed an exceedingly powerful decision maker, vested with broad authority to craft and run the program. Congress provided that the Special Master's decisions would be final and unappealable. At each of these turns, Congress weakened the appearance of integrity and accountability and narrowed the prospect that victims would get an opportunity to be heard.

The Special Master compounded the process problems of the September 11th Fund. In his Interim Final Rule, he put in place what he viewed as an efficient process designed to serve the needy and achieve horizontal equity wherever possible. To achieve his ends, the Special Master shifted as much of the Fund's work as possible to paper rather than *viva voce* hearings. He established a "presumed" figure for noneconomic losses and created a capped schedule for economic loss. In both cases he short-circuited the need for testimonial hearings. When he was done, there was virtually no room for claimants to voice their feelings, talk about their loss, or present proof about anything. Hearings, such as they were, had a two-hour time limit. On top of this, the process created situations in which the Special Master or his hearing officers could easily become the claimants' antagonists. If a claimant became dissatisfied, there was nowhere he or she could turn because the Special Master's decisions were final. This was not a process designed for claimant participation or control. Everything was removed from the claimant's hands. Although some modest process improvements were made in the Special Master's Final Rule, the Fund's autocratic character remained intact. Hearings might last more than two hours (although this was by no means encouraged), but presumptive awards, caps, and schedules still held sway. There was no more room for proof and nothing to curb hearing officers' potential antagonism.

V. Social Science Insights About Process Values

Even a cursory reading of the Special Master's Statements and the regulations of the Fund reflect Kenneth Feinberg's good faith in attempting to fashion a generous program designed to get substantial benefits quickly into the hands of September 11th victims. What is at least as clear is the Special Master's rejection of process values in the

operation of such a program. Over the last quarter century, social scientists have closely examined the role of procedure in securing participant satisfaction with respect to any program designed to resolve disputes or provide compensation. The path-breaking work in the area was the 1975 book by John Thibaut and Laurens Walker, entitled *Procedural Justice*.[54] That book concluded, on the strength of a powerful array of laboratory experiments, that process, not just bottom-line results, counts. If a process is seen as fair, claimants are more likely to be satisfied with decisions whether favorable or not. If, on the other hand, the process is perceived as unfair or unfriendly, even favorable outcomes or rich payoffs may not yield participant satisfaction. Jonathan Casper and his colleagues used Thibaut and Walker's idea to study 628 felony defendants' reactions to the outcomes of their cases (heard in three different American cities).[55] They found that felony defendants were acutely sensitive to the fairness of the procedures used in their cases and that this sensitivity had a significant impact on their satisfaction with the process. As Casper and colleagues stated in their conclusion:

> [O]ur data suggest that procedural and distributive justice play a role in litigant satisfaction even when the stakes are quite high. Our litigants were all involved in felony cases. Half received outcomes that included incarceration, a third went to prison, and all faced the possibility of serious sanctions. Their evaluations of their treatment, however, do not appear to depend exclusively upon the favorability of their sentences. Rather, their sense of fairness—in terms of both procedural and distributive justice—appears to have substantially influenced their evaluations.[56]

Similar results have been found in the cases of civil litigants in federal court (with claims up to $800,000). E. Allan Lind and others looked at the willingness of civil litigants to accept mediation awards rather than proceed to a formal trial.[57] This team found that the decision whether to accept a mediator's proposal was premised on an assessment of the procedural qualities of the mediation session rather than its outcome. Perceptions of fairness count and can deeply influence litigant behavior.

What sorts of procedures will be seen as fair and conducive to satisfaction? Thibaut and Walker, using a set of elaborate and imaginative

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54. JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

55. Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 488 (1988).

56. *Id.* at 503.

57. *See* E. Allan Lind, C.A. Kulik & M. de Vera Park, *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224 (1993).

surrogates for inquisitorial and adversarial processes, both in the United States and elsewhere, found that the key to satisfaction is a process that tends "to preserve equal access to channels of information and to mechanisms of control."[58] Individuals placed in the experimental position of claimant appear to find greatest satisfaction in an adversarial system where they, rather than the decision-maker, are empowered to control the flow of evidence.[59] By contrast, inquisitorial processes with an all-powerful inquiring magistrate were not found by Thibault and Walker to encourage satisfaction. It takes very little analysis to see that the September 11th Fund process fixed by the Special Master is insensitive to claimant satisfaction, at least in the terms framed by Thibault and Walker. With his schedules of economic loss, presumed noneconomic losses figure, and limiting approach to the presentation of proof at hearings, the Special Master has cut off virtually all claimant participation (let alone sense of control). The process mandated has virtually nothing to recommend it in procedural justice terms. Its difficulties are compounded by the dominant and unreviewable position ceded to the Special Master.

A benefit of hearings and one of the key reasons they encourage people to feel fairly treated is that they offer participants what social scientists call "voice." When people are allowed voice—when they can speak up and are listened to—they tend to react positively. Tom Tyler and his co-authors have summarized the research findings on voice:

> Crime suspects feel more fairly treated if they are allowed to speak about how they should be treated. Victims and their families also feel more fairly treated if they can speak about how a criminal should be sentenced. Workers feel more fairly treated if they can present evidence about their contributions before pay and promotion decisions. And students feel more fairly treated if they have greater opportunities to present evidence of their abilities before grades are determined. Consider one example—child custody hearings. In such situations, mothers typically win (90 percent of the time . . .). However, fathers feel more satisfied with the hearings if the court allows them to present their cases and speak about their wishes, even in situations in which they do not win custody.[60]

Voice is so important that it can powerfully influence satisfaction in a positive direction even in situations in which claimants are not al-

58. THIBAUT & WALKER, *supra* note 54, at 115.

59. *Id.* at 117-24.

60. TOM R. TYLER, ROBERT J. BOECKMANS, HEATHER J. SMITH & YUEN J. HUO, SOCIAL JUSTICE IN A DIVERSE SOCIETY 88-89 (1997) (citations omitted).

lowed to speak until after a decision has been made.[61] The September 11th Fund regulations make virtually no allowance for voice. Efficient paper processes that avoid hearings are at the heart of the machinery. No one is instructed to take the time to listen to the victims. No time is set aside for stories of loss or the value of what is gone.

Procedures that lend voice can have a number of beneficial effects. One that has been emphasized in the social science literature is enhancement of litigant dignity. E. Allan Lind and a high-powered team of scholars studied tort litigants in a number of different locations.[62] They were interested in finding out the effects of traditional and alternative litigation procedures on those involved in the tort system. One of their findings was that traditional court-based hearings were powerfully attractive and satisfying to their sample of litigants. One of the main reasons for this, the researchers hypothesized, was that traditional processes enhance "respect and dignity." The group explained their assessment as follows:

> [D]ignified procedures tend to provoke favorable responses because under them litigants feel that the court accords importance to the persons and subject matter involved in the dispute. Thus, for our tort litigants, the fact the court was willing to undertake a dignified hearing of the dispute may have constituted evidence that the civil justice system took the litigants and the dispute seriously.[63]

In the Special Master's approach, there is no real consideration of using process to send a message of dignity and respect. Rather than listening to claimants, the program's goal seems to be to place significant sums of money in their hands on the assumption that this will resolve all difficulties.

A second benefit of procedures that expand fairness by giving voice is that they tend to enhance the public's sense of the legitimacy of the processes in which they are used. Those looking from the outside at adjudicatory processes seldom have many measures by which to judge integrity and validity. In these circumstances, onlookers tend to rely upon the presence of fair-looking procedures to help them measure the value of the process. Tyler and his associates nicely summarize the apparent train of public thought and its psychological implications:

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61. *See* E. Allan Lind, Ruth Kanfer & P. Christopher Earley, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990).

62. E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felsteiner, Deborah R. Hensler, Judith Resnik & Tom R. Tyler, *The Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990).

63. *Id* at 981.

> [A]bsent objective indicators of the correctness of a decision, the best guarantee of a high-quality decision is the use of good—i.e., fair—procedures. Evaluations of the fairness of procedures serve as a heuristic that allows people to quickly evaluate the correctness of actions without really weighing all the benefits and costs associated with the action.[64]

In the case of the September 11th Fund, there are no powerful public signals of procedural fairness. What exists are caps, schedules, and an aversion to hearings. As an abstract matter, it is hard to know whether these will produce just results. Despite the Special Master's request that he be trusted, the public is offered no reason to do so. The absence of a tangibly fair and participatory process denies the Master the sort of legitimacy he seems to be seeking.

One might ask if substantial payouts by themselves may not solve these problems. The answer seems to be that, in many settings, dollars alone are not enough. Research suggests that dollars do not, by themselves, make mediation awards acceptable. As stakes rise, litigants appear to care *more* about procedural fairness.[65] If providing a lucrative award will not suffice, what about providing other benefits like diminished processing costs and accelerated resolution? Research suggests that these too are insufficient substitutes for perceived procedural fairness. Lind and his colleagues noted the following about their elaborate real world study findings:

> Some of the more striking findings of the current study involve the *absence* of expected correlations involving procedural justice judgments. Especially remarkable is the finding that there was no consistent relationship between procedural justice judgments and the objective measures of case outcome, litigation cost, or case duration.[66]

Satisfaction requires processes that are perceived to be fair and (at least generally) lend voice to participants. The Fund approach is weak on this score and negative reactions to it may be traced to this failing.

One last point deserving consideration is that procedures that are perceived as lacking in fairness can have a negative impact on those required to use them. On the personal level, such processes can result in heightened levels of stress.[67] On a communal level, they can lead to concerted political action seeking change.[68] The activities of a number of widows' and survivors' groups lend credence to the second of

64. TOM R. TYLER ET AL., *supra* note 60, at 100.

65. *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1998).

66. E. Allan Lind et al., *supra* note 62, at 968.

67. TOM R. TYLER ET AL., *supra* note 60, at 154.

68. *Id.*

these observations.[69] In sum, procedures that give voice are important. Their absence in the September 11th Fund raises questions about its efficacy and suggests that any similar efforts in the future ought to focus on process concerns as well as financial ones. It is ironic that with the best of intentions, the Special Master has, by his benevolent but autocratic approach, damaged the credibility of the process he has worked so diligently and honorably to accredit.

VI. SOME LESSONS

It is hard to know what the September 11th Victim Compensation Fund of 2001 portends, if anything, for the future development of tort and compensation law. The forces that led to the passage of the Air Transportation Safety and System Stabilization Act were unique in American experience. Neither calamitous terrorist acts like the Oklahoma City bombing nor man-made catastrophes like the asbestos mass tort problem have ever prompted Congress to provide compensation to victims. It may be that the September 11th Fund is an anomaly ascribable to a peculiar and never to be repeated set of occurrences. Legislation, however, has a way of assuming precedential proportions and the September 11th Fund may have opened a number of doors.

What lessons might we derive from the actions of Congress and the Special Master? One thing that is striking about the September 11th Fund approach is that it embraces only one of the two traditional goals of tort and negligence law, that of compensation. As to the other goal, the creation of incentives for the avoidance of injury (often loosely referred to as deterrence), the legislation is silent. The airlines are relieved of all liability and will not have to pay damages out of their own pockets. There is no fund-related fiscal motivation for the airlines to try to do a better job in the future. What is more, the airlines actually received a huge bailout designed to secure their financial well-being. If the move away from deterrence is precedential, perhaps it marks the beginning of a shift from the economic rationality of *United States v. Carroll Towing Co.*,[70] which emphasized the need for parties to make safety-related expenditures when those expenditures were smaller than the cost of the risk otherwise likely to arise. In place of a scheme focused on encouraging private parties to seek safety as part of rational economic behavior, the September 11th legislation substitutes a government payment program, at least when the

69. Lisa Belkin, *Just Money*, N.Y. TIMES, Dec. 8, 2002, § 6 (Magazine), at 92.
70. 159 F.2d 169 (2d Cir. 1947).

risk involved arises out of the criminal conduct of a third party (here the hijackers). This approach runs contrary to a series of tort cases that have expanded defendant liability for third-party criminal conduct when that conduct is deemed foreseeable and a special relationship exists between the defendant and either the third party or the victim. Such an approach has been used to hold landlords liable for criminal attacks on their tenants[71] and to hold psychotherapists liable for the violent behavior of their patients.[72] The Victim Compensation Fund sets off in an entirely different direction.

Intimately tied up with the abandonment of deterrence is a willingness to deduct collateral source payments (life insurance, pension payouts, etc.) from the awards made to victims. In traditional tort cases, no reference could be made to collateral sources and they would not be deducted from a plaintiff's award.[73] One of the reasons for this was a concern that such a deduction would reduce both a negligent defendant's burden for the loss that defendant had caused and the incentive to behave carefully. If compensation schemes track the September 11th Fund approach and move away from concern with incentives, then collateral sources will be ever more frequently considered. This is already the trend in the United States as more than a dozen states, as part of "tort reform" efforts, have allowed consideration of collateral sources.[74]

The Special Master's approach to both economic loss and noneconomic losses is significantly different from current tort doctrine. The Special Master seeks to establish a fixed schedule and presumed flat figure for these two losses respectively. The Special Master strives to cut out subjective evaluation. He eliminates the need for a communal assessment like that of a jury and makes the awarding of damages a mechanical process. One is struck by the similarity of his approach to that called for by tort reformers. In each case, caps on damages (especially those without clear economic determinants) have been the goal. Behind that goal appears to stand a strong desire to rein in awards and make judgments more predictable.

The Fund has the intent of shifting adjudication away from trials to paper and pencil assessments. Its strongest point has been the development of a reasonably sensible methodology for calculating the economic value of a lost life. That methodology takes some easily

71. *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970).

72. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

73. On the subject of collateral source payments, see generally John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478 (1966).

74. *See* MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 692 (1996).

discoverable numbers regarding income (generally established by tax returns) and translates them into a defensible award. It does so by recognizing additions to income (like fringe benefits) that increase awards, by providing realistic figures for expected remaining working life (it relies exclusively on male-only work life figures and, hence, eliminates discriminations caused by historically sexist workforce patterns), and by fairly accounting for inflation and increasing worker productivity. This approach places such calculations on a sensible and fair footing. It generally (at least up to the ninety-eighth percentile of income) produces awards that approximate real economic loss rather than artificially inflated or deflated numbers. It is to be hoped that its promulgation may have some effect on future trials regarding such matters.

The Master's approach to noneconomic losses has already been discussed in some detail. One more point, however, deserves mention. The Master stands present tort practice on its head with respect to compensation for noneconomic losses suffered by surviving claimants. Section 104.46 of the regulations provides:

> The Special Master may determine the presumed noneconomic losses for claimants who suffered physical harm (but did not die) by relying upon the noneconomic losses described in Sec. 104.44 and adjusting the losses based upon the extent of the victim's physical harm. Such presumed losses include any noneconomic component of replacement services loss.[75]

In context, the Special Master has indicated that surviving claimants will be awarded less than those who died. In cases of serious injury tried at common law, noneconomic injuries for survivors are generally far larger than those for decedents. The reason for this is that the pain and suffering experienced by the living victim continues throughout his or her life, while that of a decedent is cut off at the time of death. The rationale for the Master's shift from life-focused noneconomic damages to death-focused ones is not explained. It may have to do with replacement services (which may increase in the case of a death) or with the generally minor injuries of those who escaped the World Trade Center alive.

Until now, I have sought to evaluate the September 11th Fund on its own terms as an effort at compensation. There is an argument to be made, however, that at least a part of its true thrust is not compensation but something different—reparations. A compensation program seeks to pay for losses of one sort or another. It looks at what a

75. September 11th Victim Compensation Fund of 2001, Interim Final Rule, 66 Fed. Reg. 66,274, 66,287 (Dec. 21, 2001).

victim has suffered and seeks to attach a dollar figure. Reparation, according to *Webster's Third New International Dictionary*, is "making amends, offering expiation, or giving satisfaction for a wrong or injury."[76] This implies something different from compensation, a desire to act symbolically but tangibly to correct a wrong. Reparations may be less tightly tied to out-of-pocket loss. They may reflect society's regret or sense of responsibility. The scope of the noneconomic losses provisions in the September 11th Fund legislation and their emphasis on a speedy payout may signal not just a desire to compensate but to redress a wrong or honor a sacrifice. In these ways, the September 11th Fund may have some of the same objectives as the Civil Liberties Act of 1988,[77] which was intended to make restitution to Japanese Americans interned or otherwise deprived of their liberty or property during World War II by paying each $20,000. Reconceptualizing the September 11th Fund as, at least in part, a reparations program may help us understand a number of its requirements and give us some guidance in how to apply it.

76. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1923 (1986).
77. 50 U.S.C. app. § 1989 (1988).